IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIAN HAWKINS Plaintiff, v. ROBERT WILKIE Secretary, U.S. Dep't of Veterans Affairs, and U.S. DEPARTMENT OF VETERANS AFFAIRS, Defendants.	)	Civil Action No. 1:17-cv-2575-KBJ

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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STATEMENT OF FACTS[1]

Plaintiff Brian Hawkins entered federal civil service with the U.S. Department of Veterans Affairs ("VA") as a GS-4 clerk/typist in 1992, and steadily earned positions of higher responsibility, culminating in his promotion to the Senior Executive Service ("SES") in 2010. Administrative Record ("A.R.") at 224-26; ECF No. 27 (Amended Complaint) ¶¶15, 17-18; ECF No. 46 (Second Amended Answer to Amended Complaint) ¶¶15, 17-18. In 2011, VA selected Hawkins to be Director of the Washington, D.C. VA Medical Center ("DCVAMC"). Hawkins held that position until his unlawful removal from the federal service on September 16, 2017. ECF No. 27 ¶18; ECF No. 46 ¶18.

I. Hawkins's Property Interest In His Continued VA Employment

Since Congress enacted the Pendleton Act in 1883, to eliminate patronage appointments and to prohibit the termination of civil service for their political activity, political independence has been a defining feature of the Executive Branch's career federal workforce. *See Arnett v. Kennedy*, 416 U.S. 134, 149 (1974). To that end, tenured VA Senior Executives, like Hawkins, may only be removed for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment. *See* 5 U.S.C. § 7543(a); 38 U.S.C. § 713(a)(1) and (d)(1). Given this statutory requirement, Hawkins had a constitutionally protected property interest in his continued employment. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-42 (1985); *Stone v. Fed. Dep. Insur. Corp.*, 179 F.3d 1368, 1374-78 (Fed. Cir. 1999). As such, VA was required to

[1] Per LCvR 7(h)(2), Hawkins provides a statement of facts with references to the administrative record in lieu of a statement of undisputed material facts.

provide Hawkins with fair and meaningful due process before taking his property by removing him from the federal service. *Id.* VA did not do so.

II. David Shulkin Became VA Secretary After Years Of Political And Media Pressures To Fire VA Career Employees

In April 2014, Congress reacted to (what later proved to be false) allegations that veterans died while waiting on secret wait lists for medical care at the Phoenix VA Health Care System ("Phoenix VA"). A.R. at 215; *Helman v. Dep't of Veterans Affairs*, 856 F.3d 920, 923 (Fed. Cir. 2017); *Helman v. Dep't of Veterans Affairs*, MSPB Docket No. DE-0707-15-0091-J-1, 2014 WL 7366135 (Dec. 22, 2014). As part of that reaction, Congress enacted Section 707 of the Veterans Access, Choice, and Accountability Act of 2014 ("VACAA"), Pub. L. 113-146, 128 Stat. 1798 (codified at 38 U.S.C. § 713 (2014)).

VACAA created a statutory avenue for VA to remove Senior Executives, alternative to the Civil Service Reform Act of 1978 ("CSRA"), without pre-termination due process, for the Secretary's subjective determination of "performance or misconduct." 38 U.S.C. § 713 (2014). VACAA also limited a VA Senior Executive's post-termination review to an expedited, 21-day appeal to an employee of the Merit Systems Protection Board ("MSPB"). *Id.*

Once VACAA was enacted, VA removed the Director of the Phoenix VA, a career Senior Executive, under Section 707. That Senior Executive appealed her removal to the MSPB and eventually to the U.S. Court of Appeals for the Federal Circuit. *See Helman*, 856 F.3d at 925. While *Helman* was pending before the Federal Circuit, on May 31, 2016, the Attorney General of the United States informed Congress that the U.S. Department of Justice would not defend Section 707's constitutionality, in part. ECF No. 27 ¶21; ECT No. 44 ¶21.

VA then suspended use of Section 707 in June 2016, leaving 5 U.S.C. § 7543 as the sole mechanism utilized by VA to remove Senior Executives. *See* ECF No. 27 ¶22; U.S. Senate

Committee on Veterans Affairs, *Senate VA Committee: Senate Must Act On Veterans First Act*, https://www.veterans.senate.gov/newsroom/majority-news/senate-va-committee-senate-must-act-on-veterans-first-act_, June 23, 2016 ("Last week, the VA announced that it would no longer use its expedited removal authority to hold VA executives accountable…"); U.S. Department of Veterans Affairs, *Presidential Transition Briefing Book 2016*, https://www.oprm.va.gov/docs/foia/2016PresidentialTransitionUserGuide.pdf, November 1, 2016, at 41 ("Until such time as the [*Helman*] litigation is resolved, VA has decided to not use the Choice Act's expedited authority.").

Months later, on February 13, 2017, Dr. David Shulkin was sworn in as Secretary of the VA, a political position in which he served at the pleasure of the President of the United States, joining a reactionary and media-sensitive Administration. ECF No. 27 ¶23; ECF No. 46 ¶23.

III. Secretary Shulkin Interfered With Senior Executives' Due Process

Beginning in or around February 2017, and continuing thereafter, Secretary Shulkin and other political appointees began directing VA career employees serving as proposing officials and deciding officials on pending adverse actions against tenured, career VA employees, to remove such employees from the federal service, for improper political purposes. A.R. at 216-20; ECF No. 27 ¶¶26, 28, 30; ECF No. 46 ¶¶26, 28, 30. Secretary Shulkin gave these instructions without having read the evidence of the alleged misconduct at issue in the proposed adverse actions. A.R. at 216. Almost immediately, VA employees including management officials, human resources personnel, and others, blew the whistle on Shulkin's improper interference with the due process proceedings. A.R. at 216-20; ECF No. 27 ¶¶32-33, 35; ECF No. 46 ¶¶32-33, 35.

In Spring 2017, during a meeting with representatives of veterans' groups and Shulkin, President Donald Trump criticized the allegedly slow pace of terminating VA employees. ECF

No. 27 ¶37; ECF No. 46 ¶37; The Wall Street Journal, *Talking to Trump: A How-To Guide*, https://www.wsj.com/articles/talking-to-trump-a-how-to-guide-1516303402, Jan. 18, 2018. In so doing, President Trump instructed Shulkin: "You just need to start firing people. Let them sue us. I don't care if they sue us." ECF No. 27 ¶38; ECF No. 46 ¶38; The Wall Street Journal, Jan. 18. 2018. Soon thereafter, Shulkin told other high-level VA officials multiple times, his intentions and motivations to terminate certain VA employees, echoing President Trump. A.R. 216-220; ECF No. 27 ¶¶43-50; ECF No. 46 ¶¶43-50 The Secretary's politically motivated instruction was delivered to, amongst others, personnel in VA's Office of Accountability Review ("OAR"), the office responsible for investigating allegations of misconduct against Senior Executives and determining whether disciplinary action was warranted against Senior Executives. A.R. at 216-217; ECF No. 27 ¶¶41, 43; ECF No. 46 ¶¶41, 43. Secretary Shulkin specifically demanded that Hawkins be fired beginning in April or May 2017. A.R. at 218.

Also in Spring 2017, Shulkin's Chief of Staff, Vivieca Wright-Simpson, told OAR Executive Director Michael Culpepper that Secretary Shulkin wanted Hawkins fired quickly, for improper political and media purposes. A.R. at 218; ECF No. 27 ¶¶43-44; ECF No. 46 ¶¶43-44. Soon thereafter, Shulkin directly involved himself in Hawkins's employment, and instructed individual OAR personnel to terminate Hawkins, to satiate Shulkin's political and media demands. A.R. at 218; ECF No. 27 ¶¶45-50; ECF No. 46 ¶¶45-50.

Later, on April 12, 2017, VA OIG issued an Interim Summary Report regarding equipment and supply issues at the DCVAMC, sparking an immediate political and media response. A.R. at 11; ECF No. 27 ¶51; ECF No. 46 ¶51. Even though that Interim Summary Report did not identify Hawkins by name or attribute any specific wrongdoing to Hawkins, that same day, VA temporarily reassigned Hawkins out of his duties as Director of the DCVAMC. ECF No. 27 ¶52; ECF No. 46

¶52. Shulkin both personally and through Wright-Simpson then instructed OAR personnel to remove Hawkins from the federal service, ordering them to find *any* reason to justify the removal. A.R. at 218; ECF No. 27 ¶¶53, 55; ECF No. 46 ¶¶53, 55.

By May 2017, OAR personnel concluded their investigation of Hawkins and their review of the OIG Interim Summary Report, and determined there was no basis to remove him. A.R. at 218-19. Those personnel specifically determined that the information in the OIG's April 12, 2017 Interim Summary Report, as well as Hawkins's response to two employees (Geraldene Adams and Patrick Jones) whose nursing licenses had expired, did not warrant removal.[2] *Id.* Moreover, at that time, OAR found no misconduct by Hawkins related to the "NEAR list" allegations.[3] *Id.*

While OAR tried to resist Shulkin's directive to fire Hawkins without sufficient cause, the Federal Circuit on May 7, 2017, struck down a key element of Section 707 of the VACAA as unconstitutional. *See Helman*, 856 F.3d at 929. In response to the Federal Circuit's decision, Congress began preparing new legislation replacing the 38 U.S.C. § 713 process to remove VA Senior Executives.

Weeks after the *Helman* decision, Shulkin on May 31, 2017, opined to media reporters that "the way the judges review these cases, they can force us to take terrible managers back who have been fired for poor performance," and argued, "[w]e need new accountability legislation and we need that now." A.R. at 12-13 (citing The White House, *Press Briefing by Secretary of Veterans Affairs David Shulkin*, https://www.whitehouse.gov/briefings-statements/press-briefing-secretary-veterans-affairs-david-shulkin-053117, May 31, 2017).

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[2] These allegations were later part of the stated basis for removing Hawkins. *See* A.R. at 65 (Charge 3, Specifications 1 and 2).

[3] These "NEAR list" allegations were later part of the stated basis for removing Hawkins. *See* A.R. at 63 (Charge 1, Specification 1).

IV. VA Removed Hawkins Under 5 U.S.C. § 7543

On June 7, 2017, VA Deputy Under Secretary for Health Operations and Management Steve Young met privately with Hawkins and encouraged Hawkins to resign. A.R. at 227. Hawkins declined to do so, and the very next day, on June 8, 2017, OAR interviewed Hawkins about allegations of misconduct. ECF No. 27 ¶61; ECF No. 46 ¶61.

On June 9, 2017, one day after his OAR interview and two days after Young encouraged Hawkins to resign, Young proposed to remove Hawkins from the federal service pursuant to 5 U.S.C. § 7543, based on four charges of alleged misconduct from September 2011, to June 8, 2017. A.R. 63-67; ECF No. 27 ¶62; ECF No. 46 ¶62.

At the time Young issued the proposal on June 9, 2017, he did not have prepared copies of the evidence he purportedly relied upon to support the proposed removal. A.R. at 72, 87 n. 1, 91, 228. Four days later, on June 13, 2017, after VA finally compiled all the evidence Young supposedly relied upon to propose Hawkins's removal, VA provided Hawkins with part of its evidence. A.R. at 228. Another two days later, on June 15, 2017, Hawkins received the remainder of VA's evidence, totaling almost 7,000 pages of documents, comprising 144 exhibits and 41 transcripts of witness interviews. A.R. at 73, 228. Given this voluminous evidence file, Hawkins asked VA to identify what evidence supported each of the proposal's specifications of misconduct, a request VA ignored. A.R. at 73-74, 89, 91.

On July 5, 2017, Hawkins replied in writing to the June 9, 2017 proposal, to Acting Principal Under Secretary for Health Miguel LaPuz, and presented an oral reply to LaPuz the following day, July 6, 2017. A.R. 69-160; ECF No. 27 ¶¶69-76; ECF No. 46 ¶¶69-76. On July 26, 2017, LaPuz issued a decision sustaining every charge and specification of the June 9, 2017 proposed removal against Hawkins. A.R. 162-74; ECF No. 27 ¶¶79-80; ECF No. 46 ¶¶79-80.

V. The Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 Is Enacted

On June 23, 2017, two weeks after VA first proposed Hawkins's removal and more than one month prior to VA issuing its decision to remove Hawkins per 5 U.S.C. § 7543, President Trump signed the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 ("DVAAWPA") into law. Pub. L. 115-41, 131 Stat. 868 (codified at 38 U.S.C. § 713 (2017)).

Section 201 of the DVAAPWA amended and replaced the full text of 38 U.S.C. § 713 (2014), and created a new alternative process for removing VA Senior Executives. The DVAAWPA authorizes the Secretary to remove a Senior Executive if the Secretary determines the employee's "performance or misconduct warrants such action."[4] 38 U.S.C § 713(a)(1). The DVAAWPA entitles Senior Executives statutory due process. In particular, the Secretary must first provide a Senior Executive with "advance notice of the action and a file containing all evidence in support of the proposed action." 38 U.S.C. § 713(b)(1)(A). The subject Senior Executive is then entitled to respond within "7 business days" of the notice of the proposed action. 38 U.S.C. § 713(b)(2)(B). The Secretary then "shall" issue a decision "in writing" that "shall include the specific reasons therefor," 38 U.S.C. § 713(b)(2)(C), within "15 business days" of proposing the action, 38 U.S.C. § 713(b)(2)(A). If the Secretary cannot articulate in writing his "specific reasons" for removing the Senior Executive within the 15-business-day period as required by the statute, he implicitly cannot sustain the proposed action.

These statutory requirements are not "bureaucratic quicksand" or "burdensome administrative requirements," *see* ECF No. 26 at 15, but required due process owed to tenured

[4] "Misconduct" is defined as "includ[ing] neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." 38 U.S.C. § 713(d)(2)

employees whose property right VA seeks to extinguish. Once final, the Secretary's decision is subject to judicial review pursuant to 38 U.S.C. § 713(b)(6).

VI. Because the U.S. Office of Special Counsel Had Reasonable Grounds To Believe Hawkins's Removal Was Unlawful, The Merit Systems Protection Board Stayed Hawkins's Removal

On July 28, 2017, the U.S. Office of Special Counsel ("OSC"),[5] informally requested VA to stay Hawkins's removal for fourteen days to allow OSC to investigate allegations by OAR Executive Director Michael Culpepper and OAR Deputy Director Scott Foster that VA committed a Prohibited Personnel Practice when removing Hawkins. A.R. at 182 n. 3; ECF No. 27 ¶81; ECF No. 46 ¶81. VA denied OSC's request that same day. A.R. at 182 n. 3; ECF No. 27 ¶82; ECF No. 46 ¶82.

Later on July 28, 2017, OSC formally moved for the MSPB to order VA to stay Hawkins's removal action for 45 days while OSC investigated whether VA violated Hawkins's constitutional rights and/or committed a prohibited personnel practice.[6] A.R. at 176-188; ECF No. 27 ¶¶84-86; ECF No. 46 ¶¶84-88. Factual assertions from OSC's motion were based on information from Culpepper and Foster.[7] A.R. at 11 n. 3; ECF No. 27 ¶86; ECF No. 46 ¶86.

On August 2, 2017, MSPB granted OSC's motion and ordered VA to stay Hawkins's removal for 45 days, through September 15, 2017. ECF No. 27 ¶88; ECF No. 46 ¶88. A.R. at 190-95. Shulkin, in response to the stay order, defiantly said in a press release, "[n]o judge who has never run a hospital and never cared for our nation's veterans will force me to put an employee

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[5] OSC is the independent federal agency tasked with enforcing merit systems principles within the federal civil service and both investigating and prosecuting prohibited personnel practices. *See* 5 U.S.C. § 1212.

[6] On July 31, 2017, OSC filed an amended motion to stay. A.R. at 176-188.

[7] OSC is authorized by 5 U.S.C. § 1214(b)(1)(A)(i) to request the MSPB "to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice." *See also* 5 U.S.C. § 2302 (defining prohibited personnel practices).

back in a position" after removal. A.R. at 17 (citing U.S. Department of Veterans Affairs, *MSPB forces VA to take back fired official, VA exploring all options under new accountability authorities*, https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2939, Aug. 9, 2017); ECF No. 27 ¶89; ECF No. 46 ¶89.

VII. VA Ignored MSPB's Stay Order And Removed Hawkins Under 38 U.S.C. § 713

On August 22, 2017, less than three weeks after the MSPB ordered VA to stay Hawkins's removal for 45 days, LaPuz issued a proposal to remove Hawkins under 38 U.S.C. § 713, a process over which OSC and MSPB have no authority. A.R. at 1-8; ECF No. 27 ¶96; ECF No. 46 ¶96. This second proposed removal was based on the same four charges as the June 9, 2017 proposal, plus two "new" charges based on allegations and evidence that VA possessed prior to June 9, 2017, the date the first proposed removal was issued. ECF No. 27 ¶97; ECF No. 46 ¶97. With the second proposal, as required by 38 U.S.C. § 713(b)(1)(A), VA provided Hawkins "a file containing all evidence in support of the proposed action." Given that this file of "evidence" consisted of almost 7,000 pages, and that 38 U.S.C § 713(b)(2)(B) only afforded Hawkins "7 business days" to respond to the proposal, Hawkins requested VA to identify the evidence upon which each specification in the August 22, 2017 proposal relied. A.R. at 206; ECF No. 27 ¶¶103-104; ECF No. 46 ¶¶103-104. VA never responded to this request, just as it ignored Hawkins's similar request with the first proposal. *Id.*

On September 5, 2017, Hawkins responded in writing to the August 22, 2017 proposal; he was not afforded the opportunity to present an oral reply. A.R. at 9-238; ECF No. 27 ¶¶105, 108; ECF No. 46 ¶¶105, 108. In his written response, Hawkins submitted evidence and argument showing that his removal was being executed in violation of his Constitutional rights, and that

none of the proposal's specifications were substantiated by a preponderance of the evidence. A.R. at 9-238.

On September 13, 2017, VA Assistant Secretary for Congressional and Legislative Affairs Brooks Tucker (a political appointee who served at the pleasure of the President) issued an "initial decision" sustaining the entirety of the August 22, 2017 proposal, and removing Hawkins from the federal service effective September 16, 2017. A.R. at 239-241; ECF No. 27 ¶¶100-102, 112-116; ECF No. 46 ¶¶100-102, 112-116. The written decision generally stated that Tucker "considered" Hawkins's response, yet it did not address any specific arguments or evidence Hawkins submitted or otherwise explain why VA rejected all or Hawkins's arguments and evidence. A.R. at 239-241; ECF No. 27 ¶¶115. 151; ECF No. 46 ¶¶115, 151. The decision also stated that Tucker found "that substantial evidence supports the proposed changes." A.R. at 239.

Because Hawkins did not grieve VA's "initial decision," that decision became VA's final decision subject to judicial review in accordance with 38 U.S.C. § 713(b)(4)-(6). ECF No. 27 ¶117; ECF No. 46 ¶117. Hawkins now seeks judicial review of the VA's unlawful decision.

ARGUMENT

VA violated Hawkins's rights and issued an arbitrary and capricious decision unlawfully removing him from the career SES after twenty-five years of high-level service to veterans. The record shows that VA's decision removing Hawkins is arbitrary and capricious because it failed to address or analyze any of the material evidence and/or argument that Hawkins presented to VA's Deciding Official in defense of the August 22, 2017 proposed removal. Moreover, VA violated Hawkins's constitutional and statutory due process rights by retroactively applying the DVAAWPA to Hawkins's actions taken before the DVAAWPA was enacted on June 23, 2017, and applying a "substantial evidence" standard of proof to its final decision to remove Hawkins

from the federal service and seize his property interest. The Court should therefore enter summary judgment in Hawkins's favor on Count I ¶151, Count III, Count IV, and Count V of the Amended Complaint.

I. VA's Decision Is Arbitrary and Capricious Because It Did Not Give Reasoned Analysis or Explanation (Count I, ¶151)

Because the VA's decision did not state specific reasons for its decision, did not connect the decision to evidence, and did not address or analyze any of the numerous problems presented in Hawkins' written reply, the removal decision is arbitrary and capricious. *See City of Portland v. Envtl. Protec. Agency*, 507 F.3d 706 (D.C. Cir. 2007) (agencies must give "reasoned responses to significant comments . . . 'which, if true, raise points relevant to the agency's decision, and which, if adopted, would require a change in the agency's [proposal]") (citations omitted); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its actions, including a 'rational connection between the facts found and the choice made.'") (citing *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)).

On review, the Court "may set aside" VA's decision[8] to remove a Senior Executive, when the action is "arbitrary" or "capricious." 38 U.S.C. § 713(b)(6).[9] A decision is arbitrary and capricious if it did not "examine the relevant data and articulate a satisfactory explanation for its

[8] A court must determine the propriety of a 38 U.S.C. § 713 decision on the "basis articulated in the order by the agency itself." *See Burlington*, 371 U.S. at 169 (interpreting *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *cf. Select Specialty Hosp.-Bloomington, Inc. v. Burwell*, 757 F.3d 308 n. 3 (D.C. Cir. 2014). "[T]he courts may not accept appellate counsel's *post-hoc* rationalizations for agency action." *State Farm*, 463 U.S. at 50 (citing *Burlington*, 371 U.S. at 168).

[9] DVAAWPA's "arbitrary" and "capricious" language codified at 38 U.S.C. § 713(b)(6) should be interpreted to have the same meaning as the nearly identical language in both 38 U.S.C. § 7462(f)(2), by which courts have reviewed since 1991, VA decisions to remove VA medical personnel, *see, e.g., Lerner v. Shinseki*, W.D. Ken. No. 3:12-CV-00565, 2013 WL 5592906 (Oct. 10, 2013), and the Administrative Procedure Act ("APA"), codified at 5 U.S.C. § 706(2)(A). *See, e.g., U.S. Sugar Corp. v. Envtl. Protec. Agency*, 830 F.3d 579, 605 (D.C. Cir. 2016).

action including a rational connection between the facts found and the choice made." *New England Power Generators Ass'n, Inc. v. Fed. Energy Regulatory Comm'n*, 881 F.3d 202, 210 (D.C. Cir. 2018) (citing *State Farm*, 463 U.S. at 43). When deciding whether to remove a Senior Executive, the VA "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citing *Burlington Truck Lines*, 371 U.S. at 168).

A VA removal decision is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* Likewise, a VA removal decision "may not provide conclusory statements in place of genuine reasoning." *Hensley v. U.S.*, 292 F.Supp. 399,411 (D.D.C. 2018) (citing *AT&T Wireless Servs., Inc. v. Fed. Commc'n Comm'n*, 270 F.3d 959, 968 (D.C. Cir. 2001)).

Here, VA's decision: failed to satisfactorily explain the reasons for Hawkins's removal by rationally connecting the decision to any page of the 7,200+ page record; did not give reasoned analysis to the many factual and legal arguments Hawkins presented in opposition to the proposed removal; and did not give any explanation for why the VA rejected (or ignored) Hawkins' many relevant factual and legal arguments that, if true, required a different outcome.

A. VA's Written Decision Failed to Explain Why Hawkins's Arguments and Evidence Against Removal Were Unpersuasive

With the August 22, 2017 proposed removal, the VA provided Hawkins documents purportedly comprising "a file containing all evidence in support of the proposed actions," as

required by 38 U.S.C. § 713(b)(1)(A). This file totaled almost 7,000 pages.[10] ECF No. 16 (Certified List), at 2.

On September 5, 2017, Hawkins responded in writing to the August 22, 2017 proposal to remove him. His written reply included 300 pages of argument and evidence, and detailed numerous, specific reasons why VA could not sustain each charge and specification of the proposed removal action against him. *See* A.R. 9-238; ECF No. 27 ¶¶105-107; ECF No. 46 ¶¶105-107. These reasons included: (1) that 38 U.S.C. § 713 could not be retroactively applied to conduct occurring before its enactment, A.R. at 21; (2) that VA was required to use the preponderance of the evidence standard of proof, A.R. at 20-21; (3) that Shulkin violated Hawkins's constitutional rights by predetermining Hawkins's removal for political and media purposes, A.R. at 11-20; (4) that the specifications of alleged misconduct could not be proven, A.R. at 20-38; and (5) the penalty of removal was unreasonable, A.R. at 38-45. Any one of these reasons, if true, would have required VA to not sustain the proposed removal. ECF No. 27 ¶146; ECF No. 46 ¶146.

On September 13, 2017, VA issued its decision sustaining every charge and specification of misconduct. The decision did not reference a single page of its own voluminous evidence file and did not acknowledge any of Hawkins's specific reasons in protest. *See* A.R. 239-41; ECF No. 27 ¶¶113-15; ECF No. 46 ¶¶113-115. Rather, the decision summarily stated the deciding official "review[ed]" and "considered" Hawkins's "written and oral responses," despite the fact there was no oral response. A.R. at 239-40; ECF No. 27 ¶108; ECF No. 46 ¶108.

Such generic and erroneous (claiming to have considered a non-existent oral response) statements made without citing to a single page of evidence in the record and without analyzing

[10] On August 25, 2017, Hawkins asked VA for "[c]opies of the specific pages of evidence upon which each specification in the Notice of Proposed Removal relies," a request VA ignored. A.R. at 206; ECF No. 27 ¶¶103-104; ECF No. 44 ¶¶103-104.

any of the numerous "significant comments" raised in Hawkins written reply demonstrate that VA's decision was not rationally connected to the facts and entirely failed to consider an important aspect of the problem. *See Haselwander v. McHugh*, 774 F.3d 990, 999 (D.C. Cir. 2014) (holding "boilerplate" language does not constitute reasoned analysis); *Hensley*, 292 F.Supp.3d at 411 (a decision is arbitrary and capricious when the court "cannot discern from the conclusory statements in the record why the [agency] discounted [evidence], which if fully credited would establish [plaintiff's] claim").

In the context of VA removal decisions, other districts have held that a VA decision to remove an employee "entirely fails to consider an important aspect of the problem" where its decision reaches a conclusion without citing any evidence in the record to support its decision and without addressing any of the material evidence and argument to the contrary. *See Lerner v. Shinseki*, W.D. Ken. No. 3:12-CV-00565, 2013 WL 5592906 (Oct. 10, 2013). Likewise, in APA review of agency rulemaking, the D.C. Circuit similarly held that when agencies receive comments from many entities in response to proposed regulations, "[t]he requirement that agency action not be arbitrary or capricious includes a requirement that the agency…respond to 'relevant' and 'significant' public comments." *City of Portland*, 507 F.3d at 713 (quoting *Public Citizen, Inc. v. Fed. Aviation Admin.*, 988 F.2d 186, 197 (D.C. Cir. 1993)). "Significant comments are those 'which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in the agency's proposed rule.'" *City of Portland*, 507 F.3d at 715 (citing *Home Box Office, Inc. v. Fed. Commc'n Comm'n*, 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977)) (emphasis in original). In responding to such comments, the agency's response must explain "why the agency reacted to them as it did." *Public Citizen*, 988 F.2d at 197 (emphasis added). And where an agency does not consider arguments on their merits, "it must explain why." *Calloway v. Brownlee*, 366

F.Supp.2d 43, 55 (D.D.C. 2005) (citing *Frizelle v. Pena*, D.D.C. Civ. A. No. 93-0905, 1993 WL 548825, at *4 (Dec. 30, 1993)).

Consistent with such precedent, the DVAAWPA requires VA to articulate in its written decision "the specific reasons therefor." 38 U.S.C. § 713(b)(2)(C). Thus, Title 38 obligates VA to explain why it was unpersuaded by a Senior Executive's opposition to a proposed 38 U.S.C. § 713 action. The decision here failed to do so. Indeed, though the decision claims that the deciding official "considered" Hawkins's response to the August 22, 2017 proposed removal, the decision does not identify, discuss, or otherwise address any of the thousands of pages of evidence or any of the numerous "significant comments" in Hawkins's written reply. The decision does not explain why these "significant comments" were unpersuasive.

In his written response to the August 22, 2017 proposed removal, Hawkins presented several legal and factual arguments for why the VA could not remove him. For instance, Hawkins argued VA was required to apply the law that "was in place at the time of all conduct at issue" to remove him, and that VA was required prove its charges against him by a "preponderance of the evidence" standard of proof. A.R. at 20-21; ECF No. 27 ¶106; ECF No. 46 ¶106. Hawkins provided specific evidence and argument that he was not afforded meaningful due process because his removal was unlawfully predetermined. A.R. at 11-20, 218-220; ECF No. 27 ¶107; ECF No. 46 ¶107. Hawkins's reply also included evidence that controverted the specifications of misconduct. A.R. at 11-38, 47-238. Hawkins further explained in detail why removal was an unreasonable penalty and not warranted. A.R. at 38-46. Each of these reasons, if true, would have required VA to not sustain the proposed removal. ECF No. 27 ¶146; ECF No. 46 ¶146.

Because any one of these claims in Hawkins written reply alone would have required VA to reach a different outcome (and not terminate Hawkins), a decision lacking any reasoned analysis

to one of these claims would be arbitrary and capricious. Here, the decision did not address or otherwise analyze a single fact or argument provided in Hawkins's written reply, and did not explain why Hawkins's "significant comments" were rejected. A.R. at 239-241; ECF No. 27 ¶115; ECF No. 46 ¶115.

B. VA's Decision Did Not Explain Why the VA Retroactively Applied DVAAWPA

In his response to the August 22, 2017 proposal, Hawkins stated that retroactively applying the DVAAWPA to Hawkins's actions taken before the DVAAWPA was enacted would violate Hawkins's Constitutional right to due process. A.R. at 21; ECF No. 27 ¶106; ECF No. 46 ¶106. This statement, if true, would require the VA to change its proposal, given that the VA must provide Senior Executives meaningful due process before taking their property interest of continued employment. VA's decision to remove Hawkins did not address this "significant comment," and nonetheless retroactively applied the DVAAWPA without any explanation why the DVAAWPA could retroactively apply to conduct that occurred prior to the DVAAWPA's enactment. A.R. 239-40; ECF No. 27 ¶¶115, 151, 165-166; ECF No. 46 ¶¶115, 151, 165-166. Because VA's decision failed to offer any reasoned analysis or explanation for why it retroactively applied the DVAAWPA and ignored Hawkins's arguments to the contrary, the decision is arbitrary and capricious.[11]

C. The Decision Applied a Constitutionally and Statutorily Inadequate Standard of Proof to Remove Hawkins Without Explanation

In his response to the August 22, 2017 proposal, Hawkins stated that VA's factfinder, i.e. the Deciding Official, must apply a preponderance of the evidence standard of proof to determine

[11] VA's unconstitutional retroactive application of the DVAAWPA in violation of Hawkins's Constitutional rights is the subject of Count III of the Amended Complaint, *infra*, at 25 to 33.

whether to sustain the alleged charges and specifications of misconduct. A.R. at 20-21. Hawkins, understanding the appropriate burden of proof to be preponderance of the evidence, argued in detail that none of the specifications are supported by preponderant evidence. A.R. at 21-38. These detailed and specific protestations, if true, would require VA to not sustain the proposed action. VA's decision sustained each charge and specification against Hawkins by substantial evidence, the wrong legal standard,[12] without explanation or analysis for why it applied this standard. A.R. at 239-240; ECF No. 27 ¶¶113, 115, 151; ECF No. 46 ¶¶113, 115, 151. VA's failure to explain why it applied the erroneous standard and rejected Hawkins's argument for a higher standard of proof in its decision renders the decision arbitrary and capricious. A.R. at 239-40.

D. The Decision Ignored Evidence That Secretary Shulkin Violated Hawkins's Due Process Rights

In his response to the August 22, 2017 proposal, Hawkins provided argument and evidence that Secretary Shulkin unconstitutionally predetermined Hawkins's removal (the substance of which is at issue in Count II of the Amended Complaint, and not at issue in this Motion).[13] A.R. at 11-13. This statement, if true, would require the VA to change its proposal, given that the VA must provide Senior Executives meaningful due process before taking their property interest of continued employment. *See* ECF No. 27 ¶157; ECF No. 46 ¶157. Because the VA's decision did not address this constitutional claim, did not explain why it rejected this claim, and did not rebut or deny the evidence provided by Hawkins, the decision was arbitrary and capricious. A.R. 239-40; ECF No. 27 ¶¶115, 151; ECF No. 46 ¶¶115, 151.

[12] VA's decision to remove Hawkins based only on "substantial evidence" in violation Hawkins's Constitutional and statutory rights is the subject of Count IV and Count V of the Amended Complaint, *infra*, at 34 to 41.

[13] OSC determined, based on its assessment of similar or same evidence Hawkins included in his reply, that there were reasonable grounds to believe that VA's attempt to remove Hawkins was taken as a result of a prohibited personnel practice. *See* A.R. at 179-189, 190-195; 5 U.S.C. § 1214(b)(1)(A)(i).

E. The Decision Sustains Charges and Specifications That Run Counter to The Evidence Without Explanation

In his response to the August 22, 2017 proposal, Hawkins explained, with specific citations to the Agency's evidence file and the additional evidence he enclosed with his written reply, why VA's charges against him were contrary to the record evidence. A.R. at 21-38, 47-238. Given that Hawkins's arguments and evidence controverting the charged misconduct, if true, would require VA not sustain the proposed removal, and that the VA failed to acknowledge, address or otherwise analyze any of Hawkins's factual arguments and evidence controverting the charged misconduct, VA's decision was arbitrary and capricious.

Indeed, the decision did not cite to a single page in the 7,200+ pages record, and did not give any explanation for why any of Hawkins's factual arguments and/or evidence were unpersuasive. Instead, the decision generically claimed "[a]fter careful review of the Proposed Removal and the documentary evidence supporting the proposes action, as well as your written response to the Proposed Removal, I find that substantial evidence supports the proposed charges." A.R. at 239; ECF No. 27 ¶113; ECF No. 46 ¶113. Such a generic conclusory assertion is insufficient. *See AT&T Wireless Servs., Inc.*, 270 F.3d at 968 ("[A] conclusory assessment…does not fill the void."); *Haselwander*, 774 F.3d at 1000 (holding decision arbitrary and capricious, in part, because "Secretary does not contend that the evidence furnished by [plaintiff] is sufficient to justify [plaintiff's claim]"). VA could not sufficiently explain its decision because the charged misconduct runs counter to the record evidence, as illuminated by the glaring examples described in Hawkins's written reply and summarized below.

1. VA Sustained Charges That Hawkins Failed to Discipline A Subordinate, Contrary To Record Evidence

Charge 1, Specification 2 of the August 22, 2017 proposal erroneously claimed that Hawkins's direct report, DCVAMC employee Odeal Scott-Bedford, "did not receive any form of discipline, despite the findings related to her misconduct," and alleged, without citing any evidence, that Hawkins neglected his duty when he "failed to ensure that appropriate action was taken against Scott-Bedford for her misconduct involving unauthorized commitment of government funds." A.R. at 2-3. Relatedly, Charge 4, Specification 1 alleged that Hawkins lacked candor when he told VA investigators that he disciplined Scott-Bedford for her reported misconduct. A.R. at 4. These two specifications are based on the false premise that Hawkins did not discipline Scott-Bedford. Hawkins's written reply directed the Deciding Official to record evidence showing that Hawkins in fact disciplined her.

In his response, Hawkins highlighted the following material evidence: the DCVAMC Human Resources Officer's statement corroborating that Hawkins disciplined Scott-Bedford for her reported misconduct; Scott-Bedford's admission that she "may have" received a disciplinary action for her reported misconduct; and Hawkins's sworn testimony that he disciplined Scott-Bedford for her misconduct. A.R. at 24 (citing A.R. at 78, 159, 6381-83, 6872-73). The uniform and consistent testimony of Scott-Bedford, Hawkins, and the Human Resources Officer is uncontroverted.[14]

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[14] Hawkins issued Scott-Bedford a letter of reprimand for her reported 2015 misconduct, contrary to Charge 1, Specification 2. A letter of reprimand is a non-permanent disciplinary action. When issued, it is incumbent upon human resources personnel to place the reprimand into an employee's electronic Official Personnel Folder ("eOPF"). *See* VA Handbook 5021/14, Chapter 2.1, May 2013 (download available at: https://www.va.gov/vapubs/viewPublication.asp?Pub_ID=686). Human resources personnel subsequently remove the reprimand from the employee's eOPF. *Id.* The proposal's assertion that no reprimand was in Scott-Bedford's eOPF is therefore: (1) is not dispositive evidence that Hawkins never disciplined Scott-Bedford; and (2) consistent with the Human Resources Officer's statement that Hawkins issued the reprimand to Scott-Bedford and then gave the reprimand to human resources personnel to file in Scott-Bedford's eOPF. *See* A.R. at 159.

Contrary to this material evidence, and without any explanation or analysis, VA sustained both Charge 1, Specification 2, and Charge 4, Specification 1. The decision did not explain its rationale for sustaining these two specifications, failed to connect the decision to sustain these charges to any record evidence, and did not explain why it rejected Hawkins's evidence. *See* A.R. at 239-240; ECF No. 27 ¶¶115, 151; ECF No. 46 ¶¶115, 151. These factual determinations are contrary to the evidence and have no rational connection to the record. *See State Farm*, 463 U.S. at 43. Because the decision sustained specifications contrary to evidence without any explanation or rational connection to the record, and did not give any reasoned analysis to Hawkins's written reply demonstrating how the specifications are contrary to evidence, the decision is arbitrary and capricious.

2. VA Sustained a Charge That Hawkins Failed to Immediately Terminate Employees Who Still Work For VA

Charge 3, "Failure to Follow Policy," in the August 22, 2017 proposal, included two specifications alleging Hawkins failed to follow policy because he did not "immediately separate" two DCVAMC employees, Geraldene Adams and Patrick Jones, when their nursing licenses temporarily lapsed in December 2016 and January 2017, respectively. A.R. at 4. The crux of this charge was that VA policy required Hawkins to "immediately separate" Jones in December 2016 and Adams in January 2017.

Hawkins's response presented argument and evidence showing that contrary to the claim in the proposal that VA policy required Hawkins to "immediately" terminate these employees, VA never disciplined either Adams or Jones for the issues with their nursing licenses.[15] Thus, VA

[15] Hawkins also explained in his written reply that Adams's position did not require a nursing license, that Adams had renewed her license during a 30-day "grace period" authorized by her licensing authority, and that VA procedures did not require Hawkins to "immediately" remove Adams. A.R. at 30-31. Hawkins further identified record evidence that VA procedures did not require Hawkins to "immediately" remove Jones because, when confronted, Jones produced evidence of a current, active nursing license. *Id.*

concurrently: (1) fired Hawkins for his alleged failure to follow a policy that VA claims required two employees be terminated; and (2) continued to employ the two employees who were supposed to be fired "immediately" years ago.[16]

The decision did not explain this inherent contradiction. The decision also failed to provide any analysis of Hawkins's arguments and evidence that he was not required by policy to "immediately separate" Adams and Jones. A.R. at 239-240; ECF No. 27 ¶¶115, 151; ECF No. 46 ¶¶115, 151. The decision likewise offered no explanation why Hawkins was terminated for not firing two employees as supposedly required by policy, when these two employees continue to work at the VA. *Id.* Given this absence of reasoned analysis and explanation in the decision, the decision is arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

3. VA's Decision Did Not Explain Why VA Improperly Relied on Factors Which Congress Did Not Intend for It to Consider When Removing a Senior Executive

Hawkins cited specific evidence in his written reply to the proposal, demonstrating how VA's actions were improperly motivated by considerations beyond whether Hawkins engaged in misconduct and whether such misconduct warranted removal under 38 U.S.C. § 713 (a)(1). A.R. at 16-20. Specifically, Hawkins's written reply demonstrated how VA when removing Hawkins under 38 U.S.C. § 713, impermissibly considered the Secretary's political and media objectives, and OSC's and MSPB's intervention in VA's first attempt to remove Hawkins under 5 U.S.C. § 7543. These are factors which Congress did not intend VA to consider. *See* 38 U.S.C. § 713(d)(2); *see also State Farm*, 463 U.S. at 43.

[16] Indeed, VA's website still identifies Adams as the DCVAMC Director of Quality Management – the same position she held in 2017, when VA fired Hawkins for not immediately terminating her employment. *See* U.S. Department of Veterans Affairs, Washington DC VA Medical Center, https://www.washingtondc.va.gov/management/index.asp?cx=1&key=46, last accessed March 18, 2019.

Because VA may not consider factors that Congress did not intend VA to consider when removing a Senior Executive, Hawkins's argument and evidence in his written reply, if true, would require a different outcome than removal. Yet, the VA's decision did not provide any analysis of or explanation for why it rejected Hawkins's evidence and argument that VA considered factors not intended by Congress.

On June 9, 2017, VA proposed to remove Hawkins on four charges of alleged misconduct under 5 U.S.C. § 7543. A.R. at 63-67. Exercising its statutory authority under 5 U.S.C. § 1214(b)(1)(A)(ii), on July 28, 2017, OSC informally requested VA to stay the removal action for 14 days, because OSC determined that information from Culpepper and Foster provided "reasonable grounds" to believe that Hawkins's removal was the "result of a prohibited personnel practice." A.R. at 182 n. 3; ECF No. 27 ¶¶81-86; ECF No. 46 ¶¶81-86. VA denied OSC's informal request. *Id.* Then, on July 31, 2017, OSC requested the MSPB to order VA to stay its Title 5 removal action against Hawkins for 45 days, to allow OSC to conduct an investigation into multiple whistleblower complaints that Hawkins's removal violated 5 U.S.C. § 2302(b)(12) and Hawkins's constitutional rights to due process. A.R. at 179-85. On August 2, 2017, MSPB granted OSC's motion and ordered VA to stay Hawkins's removal action for 45 days. A.R. at 190-95.

Secretary Shulkin publicly responded to OSC's and MSPB's intervention, issuing a press statement proclaiming, "[n]o judge…will force me to put an employee back." A.R. at 17 (citing https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2939); ECF No. 27 ¶89; ECF No. 46 ¶89. VA's press release added that, "VA will quickly make an assessment of Mr. Hawkins' employment using the new evidence" of alleged e-mail misuse, and utilize the DVAAWPA to remove Hawkins.[17] A.R. at 17-18 (emphasis added).

[17] There was no "new evidence" provided by an August 1, 2017 OIG report regarding Hawkins's use of government e-mail. ECF No. 27 ¶89; ECF No. 44 ¶89. The referenced evidence was not "new." Given that VA possessed the

Less than three weeks after MSPB ordered VA to stay for 45 days Hawkins's removal, VA issued on August 22, 2017, its second proposal to remove Hawkins, invoking the DVAAWPA, to avoid OSC's and MSPB's authority to stay Hawkins's removal and investigate whether it was unlawful. A.R. at 1, 18-19; ECF No. 27 ¶96; ECF No. 46 ¶96. This second proposal brought the same charges against Hawkins as the first proposal, plus two additional charges: Charges 5 and 6 based on so-called "new" evidence.

As Hawkins explained in his response, Charge 5 was based on evidence VA included with the evidence file in support of the first proposed removal.[18] A.R. at 35. And Charge 6 was based on allegations and witness testimony to investigators on June 1, 2017, which VA possessed prior to issuing the first proposal on June 9, 2017. A.R. at 6. Thus, VA's public contention for circumventing MSPB and OSC, and issuing a new proposal to remove Hawkins (that VA obtained "new" evidence of e-mail related misconduct) was not true. Indeed, the second proposal was not based on any "new" evidence; rather, it was based on evidence VA possessed at the time of the June 9, 2017 proposed removal and at the time of MSPB's August 2, 2017 stay order.

Moreover, when VA proposed to remove Hawkins for the second time, it did so under the DVAAWPA,[19] which does not allow OSC or MSPB intervention. Thus, given the close temporal

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evidence it relied upon to issue the Misuse of Government Email Systems charge against Hawkins in the August 22, 2017 proposed removal at the time it issued the June 9, 2017 proposed removal. ECF No. 27 ¶97; ECF No. 44 ¶97. Indeed, the additional charges cites reliance on to Exhibits 101, 111, 112, 114, and 115. A.R. at 6-7. Those exhibits were all provided to Hawkins as evidence underlying the June 9, 2017 proposed removal, although that first proposal did charge Hawkins with any e-mail misuse. A.R. at 7-8, 88, 205. Thus, VA's publicly stated reason for issuing the second proposal under Title 38 and for ignoring both OSC and MSPB's efforts to investigate the "reasonable grounds to believe" that Hawkins's removal was unlawful, was false.

[18] As Hawkins said in his written reply to Charge 5, VA proposed to remove Hawkins for violating VA's policy against personal e-mail usage, a policy that Secretary Shulkin and other VA officials violated. A.R. at 34; ECF No. 27 ¶¶120, 122; ECF No. 46 ¶¶120, 122.

[19] The DVAAWPA does not prohibit VA from issuing actions under 5 U.S.C. § 7543. In fact, as Hawkins implicitly alleges in Count III, Count IV, and Count V of the Amended Complaint, VA is constitutionally and statutorily required to use 5 U.S.C. § 7543 to take action against tenured career Senior Executives (like Hawkins) for pre-DVAAWPA conduct.

proximity between the MSPB stay order and the issuance of the second proposal, and that VA publicized false reasons for disregarding MSPB's stay order, the record shows that VA improperly considered OSC's and MSPB's intervention in the first removal action and Shulkin's political and media goals of firing Hawkins when it processed the second removal action.

Because the statute only permitted VA to consider Hawkins's "performance or misconduct" to remove him, *see* 38 U.S.C. § 713(a), VA impermissibly considered facts which Congress did not intend VA to consider to remove Hawkins and failed to address Hawkins's protest of those considerations. *State Farm*, 463 U.S. at 43. Indeed, Hawkins raised these facts and arguments in his written reply, and the decision did not provide any reasoned analysis of these issues and offered no explanation for rejecting them. Therefore, the decision was arbitrary and capricious, and must be set aside.

4. VA's Decision Without Explanation Terminated Hawkins for Violating a Policy that the Secretary and Other Officials Violated

Charge 5 of the proposed removal, dated August 22, 2017, alleged Hawkins violated VA Memorandum VAIQ #7581492. The proposal specifically quoted the following from VA Memorandum VAIQ #7581492: "the use of a personal email account or the use of a personal email system to conduct official agency business is not allowed." A.R. at 5. In response to this allegation, Hawkins, through counsel, proffered in his written reply: "we understand that it is common practice for Agency personnel, including Secretary Shulkin and others at the highest levels, to utilize their personal e-mail accounts to conduct Agency business, and to send/receive e-mails to/from personal e-mail accounts that include Agency-related information." A.R. at 34. As this Court already determined, this contention, if true, renders the decision arbitrary and capricious. ECF No. 39 (Memorandum Opinion and Order). In their Second Amended Complaint, Defendants admit that "Shulkin conducted VA business from his personal non-government e-mail account,

drshulkin@aol.com, prior to and after August 22, 2017," the date of the second proposed removal, and that Shulkin and VA Chief of Staff Vivieca Wright-Simpson also "sent emails from their government accounts to Shulkin's personal email account." ECF No. 27 ¶¶120, 122; ECF No. 46 ¶¶120, 122.

The VA's decision did not deny, rebut or in any way acknowledge Hawkins's contention about the prevalence of personal email use by Secretary Shulkin and other high-level officials. Now the VA admits it is true. Yet, the VA's decision provided no analysis of Hawkins's argument, and no explanation for why it rejected the argument. Because of this failure to provide any reasoned analysis or explanation, the decision is arbitrary and capricious. Therefore, the Court should enter judgment in favor of Hawkins in Count 1, ¶ 151.

II. VA Violated Hawkins's Constitutional Right to Due Process by Retroactively Applying The DVAAWPA to Hawkins's Pre-DVAAWPA Conduct (Count III)

The Due Process Clause in the Fifth Amendment "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). By retroactively applying the DVAAWPA to Hawkins's actions taken before its enactment, the VA violated this Fifth Amendment protection.

The U.S. Supreme Court disfavors applying law to conduct occurring before such law was enacted, specifically holding that: "Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Retroactivity is disfavored, because "individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf* at 265.

"[A]bsent clear congressional intent favoring such result," the Court should not allow a statute's retroactive application. *Landgraf*, at 280. Congress did not intend the DVAAWPA to

retroactively apply to "misconduct" occurring before its enactment. Indeed, nothing in the DVAAWPA suggests retroactivity.

Where Congress has not "expressly prescribed" a statute's proper reach, the Court "must determine" whether a statutory provision may be applied retroactively. *Martin v. Hadix*, 527 U.S. 343, 357 (1999) (citing *Landgraf*, at 280). The Supreme Court has "applied the presumption against statutory retroactivity … [to] new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf* at 271, n. 25 (*emphasis added*) (citing *U.S. v. Security Industrial Bank,* 459 U.S. 70, 79–82 (1982); *Claridge Apartments Co. v. Commissioner,* 323 U.S. 141, 164 (1944); *U.S. v. St. Louis, S.F. & T.R. Co.,* 270 U.S. 1, 3 (1926); *Holt v. Henley,* 232 U.S. 637, 639 (1914); *Union Pacific R. Co. v. Laramie Stock Yards Co.,* 231 U.S. 190, 199 (1913); *In re Twenty Per Cent Cases,* 20 Wall. 179, 187, 22 L.Ed. 339 (1874); *Sohn v. Waterson,* 84 U.S. 596, 599 (1873); *Carroll v. Lessee of Carroll,* 57 U.S. 275 (1854).

To determine if a statute may be applied retroactively, the Court must consider "whether the new provision attaches new legal consequences to events completed before its enactment," or whether it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, at 270, 280. The Court's "judgment should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin*, 527 U.S. at 357-58 (citing *Landgraf*, at 270). Indeed, "the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Landgraf*, at 265 (citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990)).

Because the DVAAWPA affected VA Senior Executives' property interest in continued federal employment, and attached new legal consequences to their actions, impaired the rights they were afforded by the CSRA prior to the DVAAWPA's enactment, and increased their liability for conduct already completed, the DVAAWPA cannot be retroactively applied.

A. DVAAWPA Attached New Legal Consequences, Impaired Rights and Increased Liabilities for VA Senior Executives

The career SES was created by CSRA to address the "critical need to recruit and develop the highest quality federal executive." S. Rep. 95-969, 11, 1978 U.S.C.C.A.N. 2723, 2733. Congress structured the SES to be merit-based and centered on "individual talents and performance." *Id.* Congress also recognized that the SES's independence from political pressures is essential to its success, as the system that pre-dated the CSRA "fail[ed] to provide adequate protection against politicization of the career service" and "political abuse" of civil servants." *Id.* The CSRA thus requires that the SES be administered to "provide for an executive system which is guided by the public interest and free from improper political interference." 5 U.S.C. § 3131(13). To these ends, the CSRA provides substantial safeguards to ensure agencies remove Senior Executives for only merit-based reasons. *See* 5 U.S.C. § 7543(a) (an agency may remove a Senior Executive "only for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function").

In a CSRA removal proceeding for "misconduct," a Senior Executive is entitled: to 30 days' advance written notice before a removal action may take effect, a "reasonable time" to answer, to answer "orally and in writing," and to "furnish affidavits and other documentary evidence in support of the answer." 5 U.S.C. §7543(b). Deciding officials then determine whether the proposed charges of misconduct are proven by at least a preponderance of the evidence. *See, e.g.* A.R. at 163. If removed, a Senior Executive may appeal the action to the MSPB. *See* 5 U.S.C.

§§ 7543(d), 7701(c)(1)(B). A MSPB appeal includes discovery, a live evidentiary hearing with opportunity to cross-examine witnesses, and a *de novo* adjudication by the "preponderance of the evidence" standard of proof. 5 C.F.R. §§ 1201.51-59, 1201.71-75. In addition to proving the alleged misconduct, an agency must also prove its choice of penalty. *See Malloy v. U.S. Postal Serv.*, 578 F.3d 1351, 1356 (Fed. Cir. 2009) (citing *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 329 (1981)).

The CSRA further discourages political influence by prohibiting agencies from involuntarily removing a Senior Executive within 120 days after an appointment of the head of the agency or the appointment of the Senior Executive's most immediate, noncareer appointee supervisor with the authority to remove the Senior Executive. *See* 5 U.S.C. § 3592(b)(1). And, the CSRA authorizes OSC to request and the MSPB to grant a stay of a CSRA proposal or decision to remove a Senior Executive on OSC's determination of "reasonable grounds to believe" the action constitutes a "prohibited personnel practice." *See* 5 U.S.C. § 1214(b)(1)(A); *see also* 5 U.S.C. § 2302(b) (defining the fourteen prohibited personnel practices).

The DVAAWPA, on the other hand, affords Senior Executives subjected to removal actions for "misconduct," less process, reduced appeal rights, and increased liability. Indeed, the DVAAWPA does not guarantee a Senior Executive any specific length of advance notice before his removal may be effected, specifies a 7-day "period of response," and does not define a Senior Executive's right to answer the notice. 38 U.S.C. § 713(b); *see also* 38 U.S.C. § 713(c) (CSRA pre-removal procedural rights "do not apply" to DVAAWPA removal actions). VA has interpreted and implemented (incorrectly) the DVAAWPA to permit its deciding officials to base their factual determination in "misconduct" removals by mere "substantial evidence." A.R. at 163. Under the DVAAWPA, the penalty is determined by whatever the "Secretary determines" is warranted. 38

U.S.C. § 713(a). Also, VA final decisions to remove a Senior Executive are subject only to deferential judicial review under the "substantial evidence" standard. 38 U.S.C. § 713(b)(6).

Moreover, DVAAWPA may take place at any time, regardless of the appointment of the agency head or the appointment of other non-career appointees with removal authority. 38 U.S.C. § 713(c). And, while the DVAAWPA expressly provides for OSC intervention in removal proceedings against non-SES VA employees, *see* 38 U.S.C. § 714(e)-(f), it provides no such protection for Senior Executives. *See* 38 U.S.C. § 713; ECF No. 27 ¶96; ECF No. 46 ¶96.

Therefore, because of the material differences between the rights afforded to and liabilities of Senior Executives subjected to removal under the CSRA versus those afforded by the DVAAWPA, the DVAAWPA attaches new legal consequences to the actions of Senior Executives and impairs their rights. Given that VA's removal of Hawkins under the DVAAWPA was based entirely on pre-June 23, 2017 alleged misconduct, and that Hawkins did not know what legal consequences the DVAAWPA would later attach to his conduct after its enactment, VA's decision was not in accordance with the law – specifically, in violation of Hawkins's right to due process under the Fifth Amendment of the U.S. Constitution. ECF No. 27 ¶¶95, 165-166; ECF No. 46 ¶¶95, 165-166.

B. The DVAAWPA Cannot Be Applied Retroactively as a Matter of Law

Allowing retroactive application of the DVAAWPA to remove a Senior Executive for pre-June 23, 2017 misconduct, when Congress did not intend VA to so do, attaches a host of new legal consequences for actions completed before the DVAAWPA's enactment. *Landgraf*, at 270.

Retroactive DVAAWPA application would "impair" a Senior Executive's rights to both pre-removal process and post-removal process. Indeed, the DVAAWPA: provides shorter pre-removal process than the CSRA; does not entitle a Senior Executive to answer both orally and in

writing; does not entitle a Senior Executive to a "reasonable" time to answer, regardless of how voluminous or complex the charges and evidence against him may be; and does not entitle the Senior Executive to post-removal *de novo* evidentiary hearing with a preponderance of evidence standard of proof. *See Landgraf*, at 280; *see also See Lindh v. Murphy*, 521 U.S. 320, 327 (1997) ("[C]hanges to standards of proof and persuasion in a way favorable to [government]...affect substantive entitlement to relief."); *Bartko v. Sec. & Exchg. Comm'n*, 845 F.3d 1217, 1226 (D.C. Cir. 2017) (barring retroactive application of statute that would change burden of persuasion to government's benefit); *U.S. v. $814,254.73, in U.S. Currency, Contents of Valley Nat. Bank Account No. 1500-8339*, 51 F.3d 207, 213 (9th Cir. 1995) (holding retroactive application of statute that "effectively permits the Government to achieve the identical results...but with a lower standard of proof, directly implicates the concerns that animate the *Landgraf* default rule against retroactivity"); *U.S. v. Eleven Vehicles*, 989 F.Supp. 1143, 1153 (E.D. Pa. 1995) ("Such a result cannot be countenanced under *Landgraf*").

Retroactive DVAAWPA application would also "increase a [Senior Executive's] liabilities for past conduct," as the DVAAWPA gives the Secretary discretion to "determine" what penalty is warranted for the misconduct, whereas the CSRA requires the VA to prove its choice of penalty is within the bounds of reasonableness. As such, retroactive application would disturb "settled expectations" of the penalties for misconduct, as the Secretary may determine removal of a Senior Executive is warranted for misconduct under the DVAAWPA that was not previously a firing offense under settled CSRA case law. *See Martin*, 527 U.S. at 357-58 (citing *Landgraf*, at 270).

Given that the language of Title 38 does not provide any "clear congressional intent favoring" retroactive application of the DVAAWPA to pre-June 23, 2017 conduct, *Landgraf*, at 280, appropriate considerations of "fair notice, reasonable reliance, and settled expectations"

dictate that the DVAAWPA cannot be retroactively applied to a Senior Executive's pre-June 23, 2017 conduct. *Martin*, 527 U.S. at 357-58 (citing *Landgraf*, at 270). Because VA improperly applied retroactively the DVAAWPA to Hawkins's pre-June 23, 2017 conduct, the decision was not in accordance with the law and in violation of Hawkins's right to due process under the Fifth Amendment. ECF No. 27 ¶¶168-174.

C. The DVAAWPA Was Retroactively Applied to Hawkins in Violation of Law

All of Hawkins's actions at issue in the instant matter occurred prior to the June 23, 2017 enactment of the DVAAWPA. Such conduct was therefore subject to CSRA protections. A.R. at 1-6, 239-240. After CSRA safeguards prevented VA from removing Hawkins, *see* A.R. 190-195, VA circumvented those protections by removing Hawkins under the DVAAWPA.[20] By doing so, VA impaired Hawkins's rights, increased his liabilities, and imposed upon Hawkins new duties to transactions already completed. The Court cannot permit such an unjust result to stand. *Landgraf*, at 280.

Hawkins availed himself of the CSRA's pre-removal procedural rights to challenge VA's first proposal to remove him. After receiving notice on June 9, 2017, Hawkins responded both orally and in writing to the Deciding Official, presenting argument and evidence establishing VA's inability to meet CSRA requirements for removing him.[21] A.R. at 69-160, 228-230. Hawkins then received a decision sustaining the proposal by "preponderant evidence" and removing him from federal service. A.R. at 163.

OSC subsequently moved the MSPB for an order staying the CSRA action because OSC "ha[d] reasonable grounds to believe the VA's proposal to remove Hawkins constitute[ed] a

[20] As stated *supra*, p. 23 n. 17, VA's publicly stated reason for ignoring the MSPB's stay order and removing under the DVAAPWA was not true.

[21] In his written reply, Hawkins expressed his intent to appeal any removal to the MSPB. A.R. at 70.

prohibited personnel practice under 5 U.S.C. § 2302(b)(12)."[22] A.R. at 183-184. On August 2, 2017, MSPB granted OSC's request and ordered, in part, that Hawkins "shall be reinstated to the position he held prior to the proposed removal." A.R. at 194.

In response to the stay order, VA rescinded the MSPB-stayed action and, on August 22, 2017, proposed to remove Hawkins under the DVAAWPA, purportedly reliant on almost 7,000 pieces of evidence. A.R. at 1, 197; ECF No. 16 (Certified List). The DVAAWPA proposal charged Hawkins with the same charges of misconduct from the CSRA proposal, plus two additional stigmatizing charges of "Misuse of Government Email Systems" and "Retaliation."[23] A.R. at 1-8. Hawkins was afforded less than half of the amount of time to respond to the proposal and its almost 7,000 pieces of underlying evidence, than what he was afforded to respond to fewer charges in the CSRA proposed removal. Also unlike the CSRA process, Hawkins was not entitled to present an oral reply and personally address the Deciding Official,[24] and was not protected by OSC intervention and a MSPB stay of the removal process. ECF No. 27 ¶¶96, 108; ECF No. 46 ¶¶96, 108.

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[22] Articulating the basis of its "reasonable belief," OSC specifically asserted it had received complaints from "two individuals at the VA who were involved in Hawkins' investigation and are familiar with his proposed removal," who "separately alleged that the agency proceeded with Hawkins' proposed removal in ways that violated VA laws, rules and regulations, and Mr. Hawkins' due process rights." A.R. 182. OSC further told the MSPB, the two complainants "further allege that they were disciplined as retaliation for raising these concerns with agency officials." *Id.*

[23] The government may "stigmatize" an employee by removing him on charges of "unprofessional conduct." *See Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1111 (D.C. Cir. 1985). In any "government-initiated proceedings that threaten the individual involved with…'stigma,'" the government must prove those charges by more than a "preponderance of the evidence." *See Santosky v. Kramer*, 455 U.S. 745, 756 1982) (citing *Addington v. Texas*, 441 U.S. 418, 424-25 (1979)). VA's application of a lesser standard of proof to take its stigmatizing removal action against Hawkins is an independent statutory and Constitutional ground for vacating VA's decision, as claimed in Counts IV and V of the Amended Complaint. *Infra*, at 33 to 40.

[24] VA's final decision erroneously states it considered Hawkins's "written and oral responses" to the August 22, 2017 proposed removal. A.R. at 240. This inaccuracy is evidence that VA's final decision lacks reasoned analysis and is not supported by substantial evidence, as claimed in Count I of the Amended Complaint. ECF No. 27 ¶¶144-55. The incorrect statement is also evidence that VA failed to meaningfully consider Hawkins's response to the proposed removal, as claimed in Count II of the Amended Complaint. *Id.*, ¶¶145-61.

In its final decision, VA sustained all charges in the DVAAWPA proposal against Hawkins by merely "substantial evidence."[25] A.R. at 239. On September 16, 2017, VA effected Hawkins's removal from federal service, 25 days after it was proposed – 5 days less than VA would have been entitled to remove Hawkins under the CSRA. A.R. at 239.

The DVAAWPA now affords Hawkins lesser post-removal due process than the CSRA. Unlike an appeal of a CSRA action, Hawkins is generally unable to conduct discovery on his factual defenses to charges against him, unable to depose and to cross-examine material witnesses, and not afforded an evidentiary hearing and *de novo* adjudication with a preponderance of the evidence standard of proof. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."). Instead, Hawkins was limited to seek judicial review of VA's conclusions of fact by "substantial evidence." *See* 38 U.S.C. § 713(b)(6)(C).

Thus, by retroactively applying the DVAAWPA to remove Hawkins for his alleged pre-June 23, 2017 misconduct, VA actually impaired Hawkins's pre-removal and post-removal due process and appeal rights, and increased his liability for his past conduct. Such action violated Hawkins's right to due process under the Fifth Amendment, and cannot be countenanced under *Landgraf*. The Court must therefore issue Hawkins judgment in favor of Count III of the Amended Complaint. *See* ECF. No. 27 ¶¶168-174.

[25] VA's use of "substantial evidence" as the standard of proof to remove Hawkins is an independent statutory and Constitutional ground for vacating VA's decision, as claimed in Counts IV and V of the Amended Complaint. *Infra*, at 34 to 41.

III. VA Violated Hawkins's Constitutional and Statutory Rights To Due Process By Improperly Applying A Substantial Evidence Standard Of Proof To Remove Hawkins (Count IV and Count V)

The standard of proof required for the VA to determine whether Hawkins committed "misconduct" warranting his removal from the civil service was at least "preponderance of the evidence. Yet, the VA improperly used what 38 U.S.C. § 713(b)(6)(c) defines as the scope of judicial review, "substantial evidence." By improperly utilizing the "substantial evidence" scope of review instead of the proper standard of proof of at least "preponderance of the evidence" when deciding to take Hawkins's property interest, VA violated Hawkins's statutory and Constitutional rights to due process.

The "[standard] of proof and the scope of review in administrative law cases…are separate matters."[26] *Whitney v. Sec. & Exchg. Comm'n*, 604 F.2d 676, 681 (D.C. Cir. 1979). The distinction is "elementary but crucial." *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 282 (1966); *see also SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 379-83 (Fed. Cir. 2005) (Nies, J., concurring) (discussing relationship between standard of proof and scope of review).

The standard of proof is "the degree of certainty by which the factfinder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion." *Microsoft Corp. v. l4l Ltd. Partnership*, 564 U.S. 91, 100 n. 4 (2011) (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)). "The scope of review, of course, marks the bounds of a reviewing court's authority to set aside factual findings." *Whitney*, at 681. The scope of review "does not in any way

[26] "The term 'burden of proof' has occasionally been used as a synonym for 'standard of proof.'" *Microsoft Corp. v. l4l Ltd. Partnership*, 564 U.S. 91, 100 n. 4 (2011). *Whitney* defined "burden review" in synonymous terms to those used by *Microsoft* to define "standard of proof." *Whitney*, 604 F.2d at 681. The Court should therefore interpret *Whitney*'s use of "burden of proof" to be synonymous with "standard of proof" for the purposes of its distinction with "scope of review."

dictate" the appropriate standard of proof in an administrative proceeding. *See Collins Sec. Corp. v. Sec. & Exchg. Comm'n*, 562 F.2d 820, n. 12 (D.C. Cir. 1977).

American law traditionally recognizes three principle standards of proof that may be used by a factfinder, in order of evidentiary weight required to carry a party's burden of persuasion: preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt. *See Addington*, 441 U.S. at 423-35. "Substantial evidence" is not a fact-finding standard of proof, but an appellate standard of review, *see Steadman v. Sec. & Exchg. Comm'n*, 450 U.S. 91, 98-99 (1981), requiring less than a preponderance of the evidence for a reviewing authority to affirm a lower-level decision. *See Multimax, Inc. v. Fed. Aviation Admin.*, 231 F.3d 882, 887 (D.C. Cir. 2000); *White v. Dep't of the Army*, 720 F.2d 209, 212 (D.C. Cir. 1983); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (observing Supreme Court has applied evidentiary standard less than preponderance "as a standard of review, not as a standard of proof").

The standard of proof required in a particular proceeding "is the kind of question which has traditionally been left to the judiciary to resolve," not to the agency carrying out the administrative proceeding. *Santosky v. Kramer*, 455 U.S. 745, 755-56 (1982) (quoting *Woodby*, 385 U.S. at 284)); *White*, 720 F.2d at 213-14. "[A]bsent countervailing constitutional constraints," the courts have deferred to Congressional prescription of the standard of proof to apply in an administrative proceeding. *Steadman*, 450 U.S. at 95 (citing *Vance v. Terrazas*, 444 U.S. 252, 264 (1980)). But where Congress has not spoken, the courts themselves have prescribed the appropriate standard. *Id.* (citing *Woodby*, at 284).

As articulated below, both the DVAAWPA and the Constitution required VA to conclude by at least a preponderance of the evidence that Hawkins's actions met the statutory definition of misconduct to remove him from the civil service and take his property. *See* ECF. No. 27 ¶¶153,

162-74. Because VA applied a lesser standard of proof to Hawkins's removal (what the DVAAWPA identifies to be the post-decision scope of review), the Court must vacate the removal action, return Hawkins to VA employment, declare that VA violated Hawkins's due process rights, and other appropriate relief. *Id.*

A. VA Violated Hawkins's Statutory Right to Due Process by Removing Him For "Misconduct" By A Standard Of Proof Less Than A "Preponderance Of The Evidence" (Count V)

Congress intended the VA to apply at least a "preponderance of the evidence" standard of proof to 38 U.S.C. § 713 "misconduct" actions. Congress is presumed to enact legislation with knowledge of the existing law and a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-98 (1979). Accordingly, "the meaning of one statute may be affected by other Acts." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citing *U.S. v. Estate of Romani*, 523 U.S. 517, 530-31 (1998); *U.S. v. Fausto*, 484 U.S. 439, 453 (1988); *see also Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring) ("[S]tatutes dealing with similar subjects should be interpreted harmoniously.").

The CSRA created the SES and authorizes an agency to remove a Senior Executive for "misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." 5 U.S.C. § 7543(a). Although the CSRA text does not specify the standard of proof an agency is to apply to invoke its removal authority, VA deciding officials make their factual determinations by at least a "preponderance of the evidence." *See, e.g.*, A.R. at 163 (VA's July 26, 2017 decision to remove Hawkins under CSRA).

Aware of the CSRA, Congress enacted the DVAAWPA on June 23, 2017, authorizing the Secretary of the VA to remove Senior Executives in circumstances where the Secretary is able to

fully adjudicate the matter within 15 days of initiating the proceeding. *See* 38 U.S.C. § 713. Similar to the CSRA, Congress authorized the Secretary under the DVAAWPA to remove a Senior Executive for "misconduct," which Congress defined: "includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." 38 U.S.C. §§ 713(a), (d)(2). Also like the CSRA, the DVAAWPA does not prescribe the standard of proof by which the Secretary is required to determine whether the Senior Executive's actions meet the statutory definition of "misconduct."[27] ECF No. 27 ¶65; ECF No. 46 ¶65.

Given that the CSRA pre-dates the DVAAWPA, and that the DVAAWPA and CSRA have nearly identical authorizing language for initiating a removal proceeding against a Senior Executive for "misconduct," *compare* 5 U.S.C. § 7543(a) *with* 38 U.S.C. § 713(a)(1, (d)(2), a harmonious reading of those similar provisions shows that Congress intended the standard of proof for any factual determination of "misconduct" warranting removal to be the same for the DVAAWPA as the CSRA, preponderance of the evidence. Therefore, because the CSRA requires the ultimate factfinder in a "misconduct" removal to reach factual conclusions by a "preponderance of the evidence," Congress likewise intended the DVAAWPA to require VA to reach its factual conclusions by the same standard of proof. *Id.*

Despite this Congressional intent that the standard of proof for determining "misconduct" warranting removal, VA erroneously applied the lesser standard of "substantial evidence." By erroneously applying a lesser standard of proof contrary to the Congressional intent of 38 U.S.C. § 713, VA violated Hawkins's statutory right to due process. The Court should therefore enter judgment for Hawkins on Count V of the Amended Complaint. ECF No. 27, ¶¶168-74.

[27] The DVAAWPA does prescribe the scope of judicial review of a removal action to be "substantial evidence." 38 U.S.C. § 713(b). However, scope of review "does not in any way dictate" the required factfinder standard of proof. the Secretary's factual determinations by "substantial evidence." *See Collins*, 562 F.2d at n. 12.

B. VA Violated Hawkins's Constitutional Right to Due Process By Removing Him For "Misconduct" By A Standard Of Proof Less Than A "Preponderance Of The Evidence" (Count IV)

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington*, 441 U.S. at 423 (quoting *In re Winship*, 397 U.S. 358, 370, (1970) (Harlan, J., concurring)). Adjudicating a matter pursuant to the correct standard of proof is therefore integral to providing an individual with Constitutional Due Process. *See Santosky*, 455 U.S. at 757 (citing *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976)); *Vandervelde v. Espy*, 908 F.Supp. 11, 16 (D.D.C. 1995) (quoting *Addington*).

"Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance." *Santosky*, 455 U.S. at 757 (emphasis added). Where an agency effects a taking of an individual's property interest using a Constitutionally defective standard of proof, the action must be vacated. *Id.* Indeed, "it would be error" for the Court to enforce an agency's decision premised upon an inadequate standard of proof. *White*, 720 F.2d at 210 (citing *First Nat'l Maintenance Corp. v. Nat'l Labor Relat. Bd.*, 452 U.S. 666, 672 n. 6 (1981)); *see also Dela Cruz v. Napolitano*, 764 F.Supp.2d 1197, 1202 (S.D. Cal. 2011).

"[I]n American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation." *Charlton v. Fed. Trade. Comm'n*, 543 F.2d 903, 422 (D.C. Cir. 1976). Accordingly, the proponent in a civil administrative proceeding has traditionally born the burden of proving its case under the "preponderance of the evidence" standard of proof. *Sea Island Broadcasting Corp of S.C. v Fed. Commc'n Comm'n*, 627 F.2d 240, 243 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 834 (1980). Appellant is unable to identify any instance in which a federal court

in any jurisdiction has affirmatively validated a lower standard of proof, such as "substantial evidence," to support a final government action seizing an individual's property interest.[28] Moreover, the courts have often applied the factors in articulated in *Eldridge*, 424 U.S. at 335, to require a higher standard of proof where the "government-initiated proceedings that threaten the individual involved with a …'stigma.'" *See Santosky*, 455 U.S. at 754, 756 (citing *Addington*, 441 U.S. at 424-25).

In the public employment context, the government's asserted bases for removing a tenured government employee from the civil service may stigmatize that individual. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972) (stating government's stated reasons for removing employee may impose "stigma" on him). Indeed, this Circuit has held that an employee may be stigmatized by his removal from the civil service where the government impugns his work performance, professionalism, and/or honesty. *See Washington Teachers' Union Local No. 6, AFGE v. Bd. of Educ. of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997) (reduction in force based, in part, on ranking of performance "may have carried with it some stigma"); *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1111 (D.C. Cir. 1985) (holding employee may be stigmatized by removal on charges of "unprofessional conduct and dishonesty"). In such instances, courts may require the government to prove its charges by "clear and convincing" evidence. *Supra*, at 38.

Here, by notice dated August 22, 2017, VA invoked the DVAAWPA to propose Hawkins's removal for "misconduct." A.R. at 1-8. The Notice of Proposed Removal brought six charges of "misconduct" against Hawkins: "Neglect of Duty," "Failure to Follow Instructions," "Failure to Follow Policy," "Lack of Candor," "Misuse of Government Email Systems," and "Retaliation"

[28] *See Charlton v. Fed. Trade Comm'n*, 543 F.2d 903, 422 (D.C. Cir. 1976) ("Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating something less than the weight of the evidence."); *Smyth v. Lubbers*, 398 F.Supp. 777, 799 (W.D. Mich. 1975) ("The application of any standard lower than a 'preponderance of evidence' would have the effect of requiring the accused to prove his innocence.").

against a purported whistleblower. A.R. at 1-8. These charges impugning Hawkins's work performance, professionalism, and honesty were stigmatizing (if sustained) and therefore may have required VA to adjudicate them by a "clear and convincing standard of proof." *Supra*, at 38. Regardless, the notice failed to specify the standard of proof the factfinder would apply to the proceeding. *See Santosky*, 455 U.S. at 757.

In response to VA's August 22, 2017 notice, Hawkins argued VA could not sustain any of the six charges of misconduct against him by even a preponderance of the evidence. A.R. at 20-21 (citing 5 C.F.R. § 1201.4(q) for definition of "preponderant evidence"). For VA to apply a lesser burden of proof, Hawkins argued "would be to sustain the factual finding in bad faith" and "may further violate [his] Constitutional right to due process." A.R. at 21; ECF No. 27 ¶106; ECF No. 46 ¶106.

Despite the lack of prior calibration and Hawkins's protestations, VA's final decision expressly stated VA sustained all six charges against Hawkins by "substantial evidence."[29] A.R. at 239-240; ECF No. 27 ¶¶113, 115, 151; ECF No. 46 ¶¶113, 115, 151. In addition to sustaining the stigmatizing allegations of misconduct, the final decision further stigmatized Hawkins by claiming (without citing any evidence) that Hawkins's actions "put Veterans at risk."[30] A.R. at 239. On September 16, 2017, VA effected Hawkins's removal from the federal service. ECF No. 27 ¶116; ECF No. 46 ¶116. And on September 20, 2017, VA announced via public press release that it "fired" Hawkins, publicizing the stigmatizing action. ECF No. 27 ¶118; ECF No. 46 ¶118.

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[29] Where a factfinder "expressly stated that he was applying the substantial evidence test and there was nothing in his opinion to indicate his views on the sufficiency of the evidence under any other standard," the Court "cannot" make the "extreme assumption" that the factfinder would have sustained his factual determinations by a higher standard of proof. *White*, 720 F.2d at 210.

[30] The VA further stigmatized Hawkins when Secretary Shulkin claimed without evidence that Hawkins "allowed the facility to pose potential safety risk to our Veterans." ECF No. 27 ¶89; ECF No. 44 ¶89.

VA thus removed Hawkins from federal service improperly utilizing a standard of proof less than a preponderance of the evidence to factually conclude that Hawkins committed multiple acts of stigmatizing misconduct, warranting the taking of his property interest in continued federal employment. ECF No. 27 ¶¶172-73. By doing so, VA violated Hawkins's Constitutional right to due process by effecting his removal and taking his property on a Constitutionally defective standard of proof. *See Santosky*, 455 U.S. at 757. The Court must therefore grant Hawkins judgement on Count IV of the Amended Complaint and provide him the relief he seeks, including to set aside VA's removal decision, retroactively return Hawkins to VA employment, and declare VA's conduct removing him from federal service to be unlawful and unconstitutional. *White*, 720 F.2d at 210.

CONCLUSION

For the foregoing reasons, the Court should enter judgment in Hawkins's favor as to Count I ¶151, Count III, Count IV, and Count V of the Amended Complaint. As relief, the Court should aside the September 13, 2017 decision removing Hawkins from federal service, retroactively return Hawkins to duty and award him all benefits to which he is entitled under 5 U.S.C. § 5596, declare Defendants' conduct removing Hawkins from the federal service to be unlawful and unconstitutional, award Hawkins his costs and attorney's fees, and any other such relief as the Court deems just and proper.

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